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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1962

## No. 927

REGINALD G. HEARN and MARY L. HEARN, husband and wife,
*Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals for the Ninth Circuit

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to the United States Court of Appeals
for the Ninth Circuit

Petitioners, by their counsel, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which decision affirmed the decision of the Tax Court of the United States. The decision and opinion of the United States Court of Appeals for the Ninth Circuit was filed and entered on October 31, 1962. A petition for

rehearing was timely made on November 26, 1962. The aforesaid petition for rehearing was denied by order dated December 14, 1962.

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## I.

### OPINIONS BELOW

The opinion of the United States Tax Court in support of its judgment is appended hereto and marked Appendix 1. The opinion of the United States Court of Appeals for the Ninth Circuit is appended hereto and marked Appendix 2. The aforesaid opinion of the United States Court of Appeals for the Ninth Circuit is cited at 309 Fed. 2nd, page 431. The judgment of the United States Court of Appeals for the Ninth Circuit is appended hereto and marked Appendix 3.

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## II.

### JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the terms and provisions of 28 USCA, Section 1254, Subdivision 1.

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## III.

### QUESTION PRESENTED

Can a lawyer be compelled to disclose the names and addresses of his clients to the Commissioner of

Internal Revenue incident to an audit of the income tax returns filed by said lawyer?

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## IV.

### STATEMENT OF THE CASE

Petitioner Reginald G. Hearn is a lawyer duly admitted to practice in the State of California and the United States Supreme Court. He conducts his practice as a sole practitioner in the City and County of San Francisco, State of California. Incident to an audit of his income tax returns for the years 1954, 1955 and 1956, demand was made upon him to divulge the names and addresses of clients whom he entertained. Petitioner refused to comply with said demand and explained that this would violate the attorney-client relationship, the privileges inherent therein and the rights of clients predicated thereon. Based upon said refusal the Commissioner of Internal Revenue disallowed 85% of the claimed allowances for entertainment and assessed substantial deficiencies for said years. Evidence was introduced in substantiation of the aforesaid entertainment in the form of cancelled checks, vouchers, receipted statements and the sworn testimony of taxpayer-petitioner in his capacity as an officer of the court. In addition thereto, substantial circumstantial evidence was presented to the courts below indicating with certainty that the entertainment must of necessity have been pursued, that the costs claimed therefor were expended, that the entertainment was necessary to petitioner's profession and pro-

duced substantial increases in income. Because of the fact that petitioner refused to divulge the identity of his clients, the courts below held that petitioner had wholly failed to sustain the burden of proof.

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## V.

### LEGAL ARGUMENT

The decision of the United States Court of Appeals for the Ninth Circuit results in a violation of the law of the State of California concerning the attorney-client relationship and the inherent privileges therein, is contrary to the decisions of the United States Court of Appeals for the Ninth Circuit concerning the subject of attorney-client confidential relationships and violates provisions of the Constitutions of the State of California and the United States in that it would compel petitioner-lawyer to subject himself to civil and criminal liability instituted on behalf of clients whose identities were divulged, thereby depriving him of property without due process of law and preventing him from successfully engaging in the pursuit of the practice of law.

Section 1881 of the Code of Civil Procedure of the State of California provides in part as follows:

> "*Privileged Communications.*
>
> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate: therefore, a person cannot be examined as a witness in the following cases:

"2. *Attorney and Client*—

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment; . . ."

Section 6060, et seq., of the Business and Professions Code of the State of California provides as follows:

"The State Bar of California is made up of members admitted and licensed to practice law. Each attorney must take an oath agreeing, among other things, faithfully to discharge the duties of an attorney at law. Among those duties prescribed is to maintain inviolate the confidence and at every peril to himself to preserve the secrets of his clients."

It is basic that a confidence is, in reality, the fact of employment or consultation. If a person who had consulted a lawyer for the purpose of obtaining advice were to be interrogated by an internal revenue agent incident to the fact of entertainment, it is clear that the above principles would be violated. The only purpose of demanding names and addresses of the clients who were entertained by the lawyer is to substantiate the assertions of the lawyer relative to entertainment. Such attempted substantiation, if permitted, would rapidly destroy the practice of the lawyer in question and subject him to civil and criminal liability for disclosing the confidential relationship and breaching the law relative thereto. Any client has the right to demand that the fact of consultation be kept a secret.

The case of *Baird v. Koerner*, decided by the United States Court of Appeals, Ninth Circuit, in 1960, cited at 279 Fed. 2nd 623, is an analogous case as far as prohibiting inquiry relative to the attorney-client relationship. In that case the United States Government attempted to force an attorney to disclose identity of a client and the trial court was reversed by the Court of Appeals which said that no one could force an attorney to divulge the name or identity of a client.

It is believed that this is a case of first impression and that the principle involved herein will materially affect every lawyer in the United States. The impact of the decision upon the profession will be severe and, of necessity, will result in a multiplicity of litigation involving lawyers and the United States Government and clients and the United States Government.

For the foregoing reasons, the Supreme Court of the United States should issue a writ of certiorari in order that this case may be reconsidered and decided commensurate with principles of law applicable thereto and in accordance with the constitutional guarantees involved in this case.

Dated, San Francisco, California,
March 6, 1963.

REGINALD G. HEARN,
*Attorney for Petitioners.*

**(Appendices 1, 2 and 3 Follow)**

## Appendix 1

36 T. C. No. 69

*Tax Court of the United States*

Docket No. 80206 — Filed July 14, 1961

Reginald G. Hearn and Mary L. Hearn, Petitioners.

vs.

Commissioner of Internal Revenue, Respondent.

1. Entertainment and other expenses claimed by T, a lawyer, in excess of amounts allowed by the Commissioner, largely unsubstantiated and not convincingly shown to have any proximate relationship to T's business, *held* not deductible from gross income as ordinary and necessary business expenses.

2. Advances on behalf of clients by T *held* not deductible when made, even though regarded as "doubtful" by T, where he was entitled to reimbursement and in fact did receive reimbursement of the bulk of such advances in subsequent years. Cf. *Henry F. Cochrane*, 23 B.T.A. 202.

*Reginald G. Hearn, Esq., pro se.*
*Donald G. Daiker, Esq.*, for the respondent.

### Opinion

RAUM, *Judge:* The Commissioner determined deficiencies in income tax against petitioners, husband

and wife, for the years 1954-1956 in the amounts of $4,781.99, $8,133.22, and $11,352.56, respectively. They filed their returns with the district director at San Francisco. A series of adjustments with respect to all three years, referred to as "business expenses", is presently in issue. The husband is an attorney, and the alleged expenses in question were claimed as deductions relating to his practice of law. He will hereinafter be referred to as petitioner.

The returns for the three years in controversy claimed a variety of deductible expenses that were allowed in full by the Commissioner. Such expenses were in the aggregate amounts of $10,435.68, $10,857.21, and $12,805.71, for the years 1954-1956, respectively, and were described as "Salaries", "Rent", "Interest", "Taxes", "Depreciation - Furniture & Fixtures", "Telephone", "Stenographic services", "Stationery & office supplies", "Postage", "Linen service - laundry", "Research & adm. assistance", "Flowers", "Petty cash", "Books and publications", "Misc. office expense", "Safe deposit box rental", "Service charge - bank accts.", "Office insurance", "Insurance premiums (re disability)", "Maintenance & repair of equipment", "Employer contribution - FICA and UI", and "Advances not reimbursed".

In addition to the foregoing expenses that were allowed in full, the returns claimed deductions with respect to certain other alleged expenses, most of which were disallowed in part and some in full, as follows:

| | 1954 | | |
|---|---|---|---|
| | Claimed | Allowed | Disallowed |
| Entertainment* | $ 8,292.07 | $ 1,200.00 | $ 7,092.07 |
| Travel* | 1,600.00 | 200.00 | 1,400.00 |
| Promotion | 910.00 | 50.00 | 860.00 |
| Taxi fares | 372.00 | 100.00 | 272.00 |
| Depreciation—Auto | 510.00 | 170.00 | 340.00 |
| Other auto expenses | 1,455.60 | 485.23 | 970.37 |
| Professional clubs &dues | 537.00 | 268.50 | 268.50 |
| Depreciation—Boat | — | — | — |
| Boat expenses | — | — | — |
| Contributions | 175.00 | — | 175.00 |
| Advances not reimbursed | — | — | — |
| | $13,851.67 | $ 2,473.73 | $11,377.94 |

| | 1955 | | |
|---|---|---|---|
| | Claimed | Allowed | Disallowed |
| Entertainment* | $10,392.35 | $ 1,692.35 | $ 8,700.00 |
| Travel* | — | — | — |
| Promotion | 560.00 | 60.00 | 500.00 |
| Taxi fares | — | — | — |
| Depreciation—Auto | 800.00 | 200.00 | 600.00 |
| Other auto expenses | 1,470.30 | 470.30 | 1,000.00 |
| Professional clubs & dues | 1,594.86 | 294.86 | 1,300.00 |
| Depreciation—Boat | — | — | — |
| Boat expenses | — | — | — |
| Contributions | 40.00 | — | 40.00 |
| Advances not reimbursed | — | — | — |
| | $14,857.51 | $ 2,717.51 | $12,140.00 |

| | 1956 | | |
|---|---|---|---|
| | Claimed | Allowed | Disallowed |
| Entertainment* | $13,379.69 | $ 1,779.69 | $11,600.00 |
| Travel* | — | — | — |
| Promotion | 424.16 | 74.16 | 350.00 |
| Taxi fares | 499.20 | 99.20 | 400.00 |
| Depreciation—Auto | 600.00 | 200.00 | 400.00 |
| Other auto expenses | 1,212.27 | 362.27 | 850.00 |
| Professional clubs & dues | 999.86 | 999.86 | — |
| Depreciation—Boat | 150.00 | — | 150.00 |
| Boat expenses | 1,902.20 | — | 1,902.20 |
| Contributions | 93.00 | — | 93.00 |
| Advances not reimbursed | 3,639.94 | — | 3,639.94 |
| | $22,900.32 | $ 3,515.18 | $19,385.14 |

*"Entertainment" and "travel" were treated as separate items in 1954 but were combined as a single item designated "entertainment" in 1955 and 1956.

The principal issue before us is first, whether petitioner in fact made the contested expenditures with respect to most of these items, and secondly, whether these items, even if fully substantiated, were proximately related to petitioner's practice of law so as to be deductible as business expenses.[1]

A stipulation filed by the parties furnishes partial substantiation for the auto and boat expenses. Also the stipulation shows that petitioner paid aggregate amounts of $2,697.35, $2,423,64 and $3,272.61 during the years 1954, 1955, and 1956, respectively, to various clubs, restaurants, hotels, and the like. Petitioner appeared as a witness on his own behalf. Apart from the stipulated materials, he presented no records or proof with respect to the contested items other than his own testimony. Although we do not suggest that sworn testimony itself may not be suitable proof in appropriate cases, the testimony here was so general and of such summary and conclusory character that, in our opinion, petitioner has wholly failed to carry the burden of proof, not only as to the making of the expenditures in question (in excess of the amounts stipulated) but also as to the necessary proximate relationship between the alleged expenditures and his business.

Petitioner appeared to us to be an experienced and sophisticated lawyer; and we do not feel that we should indulge in conjecture to fill the gaps in his proof. The

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[1]The controversy with respect to the last item identified as "Advances not reimbursed" is somewhat different and will be dealt with separately hereinafter.

expenses in question are of such nature as to afford considerable opportunity for abuse, and it is not too much to ask of a taxpayer seeking the benefit of such deductions that he offer not only reasonably satisfying proof that the expenses were in fact incurred but also that they bore a proximate relationship to the conduct of his business. Cf. *Ralph E. Larrabee,* 33 T.C. 838, 842; *Eugene H. Walet, Jr.,* 31 T.C. 461, 471, affirmed 272 F. 2d 694 (C.A. 5). Petitioner's admission on cross-examination that some of the claimed expenses related to the cost of meals for himself and his wife, possibly in the company of others not convincingly shown to have any business connection with petitioner, was hardly reassuring. For aught we know other expenses in controversy may have been wholly personal, or their relationship to petitioner's business may have been so remote as to fail to qualify for deduction. Petitioner's general testimony was not convincing evidence in the circumstances of this case.

The Commissioner did allow a portion of most of the claimed deductions, and we cannot say on this record that petitioners are entitled to anything in excess of that allowed. We hold that no error has been shown in the Commissioner's determination.

As to the item designated "Advances not reimbursed", the evidence does show that petitioner made cash advances in 1956 in the aggregate amount of $3,639.94 on behalf of clients with respect to 50 cases pending in his office. He testified that he regarded these as "doubtful" items and took deductions therefor, intending to report as income in later years any

such item for which he might subsequently receive reimbursement. In fact the evidence shows that he did receive reimbursement of 32 of those items aggregating $1,982.95 in 1957, and one item in the amount of $1,035.54 in 1958; and he testified that he reported the amounts thus repaid as income for 1957 and 1958, respectively.

It has been established that such advances may not be deducted as business expenses. *Henry F. Cochrane,* 23 B.T.A. 202. Nor is there any justification on this record for allowing the deduction as bad debts. Although petitioner testified that he thought these items were "doubtful", we cannot find in the context of the record before us that any of the advances in question represented debts which became worthless in 1956. The years 1957 and 1958 are not before us, and we do not consider whether petitioner is entitled to an adjustment in his favor for those years by reason of his reporting as income the advances which he collected in those years.

*Decision will be entered for the respondent.*[2]

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[2]The Commissioner has requested that decision be entered under Rule 50 to reflect a "concession" made by petitioners that might require an increased deficiency for one of the years with respect to a comparatively minor item not theretofore in contest. We do not understand petitioners' "concession" to be a waiver of the statutory requirement relating to increased deficiencies, and will not consider this item.

## Appendix 2

*United States Court of Appeals*
*for the Ninth Circuit.*

| | |
|---|---|
| Reginald G. Hearn and Mary L. Hearn, Husband and wife, Petitioners, vs. Commissioner of Internal Revenue, Respondent. | No. 17,620 Oct. 31, 1962. |

Petition to Review a Decision of the Tax Court of the United States

Before: CHAMBERS and HAMLEY, Circuit Judges, and BOWEN, District Judge

BOWEN, District Judge:

Income tax deficiencies for the years 1954, 1955 and 1956 were assessed by respondent Commissioner against petitioners Hearn and his wife, those assessments were at petitioners' request redetermined by the Tax Court, and now the petitioners husband, an active practicing attorney and member of the San Francisco Bar, and his wife, asserting erroneous disallowances of certain business expenses claimed as income deductions, timely ask this Court to review the

action of the Tax Court.[1] This Court has jursidiction. 26 U.S.C. § 7482.

The principal question raised here is whether the claimed deductions were "ordinary and necessary business expenses" with the meaning of 26 U.S.C. § 162 (a), and that question is one of fact.

Acting upon a stipulation of the parties, the Commissioner in his redetermination of such deficiencies allowed and the Tax Court approved part of various club, restaurant, hotel, auto, boat, office and business expenses as income tax deductions, as to which neither side raises any question, and to which the following statements are not to be applied.

Petitioner's expenses claimed by him deductible as ordinary and necessary business expenses fall into two categories, first, a wide variety of expenses grouped together as entertainment expenses, and second, litigation expense advances.

As to the first category, the entertainment expenses now claimed as deductible include petitioner's private club dues and the costs of his entertaining at clubs, restaurants and cocktail bars persons thought likely to have, or likely to influence the placement of, law business, with the hope of thereby increasing petitioner's law practice, a hope which he with emphasis says was realized. Included also in that category are

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[1] Although both the husband and wife petitioners for income tax purposes are interested, we hereafter in this opinion for convenience use the singular "petitioner" instead of the plural "petitioners" because all the claimed deductions allegedly pertain to only the husband's conduct of his law practice.

petitioner's automobile operating and parking expenses relating to the business, personal and family use of his automobile, and additionally so included is the expense of petitioner's boating for entertainment of himself and his prospective clients, as well as the expense for his donations and flowers made and presented for good will purposes.[2]

As to those expenses in that first category, the record very convincingly shows that petitioner kept no business or expense records, that personal entertainment expenses of himself and family and other persons occurring on occasions unrelated to the business needs of petitioner's law practice were commingled with expenses which might, although not properly shown to, have been so related, and that as to all his above mentioned entertainment expenses he, without benefit of supporting records produced in court, took an averaged unit expense, and with that as a guide computed or estimated his contested entertainment expenses.

Respecting the above mentioned entertainment expenses, the Tax Court found and ruled that

> "* * * * * * * * *, he (petitioner) presented no records or proof with respect to the contested items other than his own testimony. * * * *, the testimony here was so general and of such summary and conclusory character that, in our

[2]Although some of these not strictly entertainment expenses were treated separately from "entertainment" expenses by petitioner in his 1954 tax return, he in his 1955 and 1956 returns combined and treated them as entertainment expenses as for convenience does this Court.

opinion, petitioner has wholly failed to carry the burden of proof, not only as to the making of the expenditures in question * * * * but also as to the necessary proximate relationship between the alleged expenditures and his business.

"Petitioner appeared to us to be an experienced and sophisticated lawyer; and we do not feel that we should indulge in conjecture to fill the gaps in his proof. The expenses in question are of such nature as to afford considerable opportunity for abuse, and it is not too much to ask of a taxpayer seeking the benefit of such deductions that he offer not only reasonably satisfying proof that the expenses were in fact incurred but also that they bore a proximate relationship to the conduct of his business. Cf. Ralph E. Larrabee, 33 T.C. 838-842; Eugene H. Walet, Jr., 31 T.C. 461, 471, affirmed 272 F.2d 694 (C.A. 5). Petitioners (sic) admission on cross-examination that some of the claimed expenses related to the cost of meals for himself and his wife, possibly in the company of others not convincingly shown to have any business connection with petitioner, was hardly reassuring. For aught we know other expenses in controversy may have been wholly personal, or their relationship to petitioner's business may have been so remote as to fail to qualify for deduction. Petitioner's general testimony was not convincing evidence in the circumstances of this case." (Parentheses added.)

We have carefully reviewed the record and find therefrom the Tax Court's opinion is strongly supported and amply justified as to the entertainment expenses, and as to them, since as the Tax Court found

and we agree that petitioner has not met his burden of proof that the questioned expenses are ordinary and necessary business expenses of petitioner's law business, this Court's decision in Young v. C.I.R., 268 F.2d 245 (9 Cir., 1959) is dispositive as against the contentions of petitioner that they are. Likewise, petioner has failed to sustain his burden of proof respecting the subordinate issue whether such entertainment expenses had a proximate relation to petitioner's business.

The second category, including litigation expense advances, relates to fifty cases handled in petitioner's law practice in 1956. He did establish his making of cash advances in that year in the total amount of $3,639.94 in all those fifty cases. Although thinking that these were doubtful items but taking deductions therefor in his 1956 income tax return, he intended to report as income in later years any such items for which he might subsequently be reimbursed by clients. In fact, as to thirty-two of those cases aggregating $1,982.95 in 1957 and one case involving $1,035.54 in 1958, he did receive reimbursement and says that he reported the amounts thus received as income for 1957 and 1958 respectively. Since the legality of petitioner's income tax reporting for the years '57 and '58 were not questioned before the Tax Court in the present proceeding, it properly did not consider whether petitioner is entitled in this proceeding to any adjustment in his favor regarding those years.

We think the Tax Court correctly ruled that such uncollected litigation advances as are here involved

may not as to petitioner's 1956 tax return be deducted as business expenses for that year because the uncollected ones may still be recovered from clients as have already been more than half of the original fifty. Grelck Condensed Buttermilk Co., 7 B.T.A. 79; Charles E. Albright, 16 B.T.A. 1228; Henry F. Cochrane, 23 B.T.A. 202; Ralph E. Larrabee, 33 T.C. 838. Further, they are not to be deducted as bad debts of 1956 because the record does not show that any of the advances became worthless in that year, and it was not shown that the uncollected advances became business expenses of petitioner in 1956.

As to those uncollected litigation advances, therefore, petitioner as the Tax Court properly found has not sustained his burden of proof to show that such advances were either uncollectible and bad debts owing to him or business expenses of his own in 1956, and may not in this proceeding be allowed for that year his claimed deductions for them. But that is not to say whether he may, in later income tax returns not here involved, appropriately prove as deductible any of such presently uncollected litigation advances.

As was true of the petitioner in Young, supra, the petitioner here has not shown and we do not find that, as to either petitioner's entertainment expenses or his litigation expense advances, the Tax Court's decision was plainly erroneous.

The action of the Tax Court in this case is AFFIRMED.

CHAMBERS, Circuit Judge, concurring:

While the foregoing opinion is adequate, it does not disclose that the amounts attempted to be deducted are great. Our decision, if it stands, means that Lawyer Hearn may have to spend the next five or ten years working off the deficiency with tax-paid dollars. I have a great deal of sympathy for him in his predicament. But representing himself, he, as most lawyers do when they represent themselves, has refused to recognize the weakness of his case. He contends, as I read the record, that the entertainment items were really distasteful to him, but that entertain extravagantly he must to make an adequate living professionally in San Francisco. But it was open to the tax court to listen to his testimony and conclude that he really enjoyed, per se, his social activities. I do not say he enjoyed them, but it was a permissible inference for a trier of fact.

Also, while the commissioner makes no point of it, there well may be a question in the next similar case (where the taxpayer has his deductions well documented) as to the legality of such large deductions at all for a lawyer for "business getting." I am sure many deduct therefor in a modest way, but I wonder about the cost of an intensive campaign to get legal business. On that, I reserve my dicta.

(Endorsed) Opinion and Concurring Opinion Filed Oct. 31, 1962.

Frank H. Schmid, Clerk.

## Appendix 3

*United States Court of Appeals*
*for the Ninth Circuit*

| | |
|---|---|
| Reginald G. Hearn and Mary L. Hearn, Petitioners, vs. Commissioner of Internal Revenue, Respondent. | No. 17,620 |

### JUDGMENT

Upon Petition to Review a Decision of
The Tax Court of the United States

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this Cause, be, and hereby is affirmed.

Filed and entered October 31, 1962.